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No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTION PRESENTED

Does an action brought as a taxpayer's suit violate the due process rights of taxpayers when the interests of the representative plaintiff are directly antagonistic to the interests of the taxpayers it purports to represent?

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In The

Supreme Court of the United States

October Term 1982

ROBINSON BUS SERVICE, INC., STEWART BUS COMPANY, INC., RAPID TRANSPORTATION, INC., STUDENT TRANSIT CORPORATION and NORTHTOWN BUS SERVICE, LTD.,

Petitioners,

v.

WILLETT MOTOR COACH CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioners Robinson Bus Service, Inc., Stewart Bus Company, Inc., Rapid Transportation, Inc., Student Transit Corporation and Northtown Bus Service, Ltd.,* pray that a writ of certiorari issue to review the opinion and judgment of the Appellate Court of Illinois, First Judicial District, Second Division, entered on December 29, 1981.

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* Petitioners' statements pursuant to Supreme Court Rule 28.1 are set forth in the Appendix hereto at page A-17.

In addition to the parties listed in the caption of this Petition, the Board of Education of the City of Chicago, Illinois was the party defendant in the proceedings below.

OPINIONS BELOW

The Order of the Supreme Court of Illinois denying the Petition for Leave to Appeal is set forth commencing at page A-1 of the Appendix hereto. The denial of the Petition for Rehearing to the Illinois Appellate Court is set forth commencing at page A-2 of the Appendix hereto. The opinion of the Illinois Appellate Court is reported at 103 Ill. App. 3d 760, 431 N.E.2d 1190, and is set forth commencing at page A-3 of the Appendix hereto. The unpublished order of the Circuit Court of Cook County, Illinois is set forth at page A-16 of the Appendix hereto.

JURISDICTION

The order of the Supreme Court of Illinois was entered on May 28, 1982, and this petition for certiorari was filed within 90 days of that date.* This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

* No petition for rehearing was filed with the Illinois Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law. . . ."

STATEMENT OF THE CASE

This action arises out of the award of a three-year public contract involving the transportation of handicapped children. In March 1980, the Board of Education of the City of Chicago (the "Board") mailed a "Solicitation of Bids" to prospective bidders and advertised the Solicitation of Bids in a local newspaper. Thereafter, a $36.8 million contract was awarded to a total of twelve different bus companies, including Petitioners herein. Because of modifications in bidding restrictions, small independent bus companies were able for the first time to compete for this public business, thereby resulting in Respondent Willett's loss of a contract it held for the previous 54 years.

In June 1980, Willett filed the instant lawsuit against the Board and other parties seeking to invalidate the contract award. Willett alleged that it had not received one of two amendments to the Bid Solicitation that had been issued by the Board by mail prior to the bid opening. The bid amendment which Willett claimed it had not received changed a unilateral cancellation provision in the contract, which permitted only the Board to cancel the contract, to a mutual cancellation provision, permitting the bus companies themselves to cancel prior

to the expiration of the contract. Petitioners herein, Robinson Bus Service, Inc., Stewart Bus Company, Inc., Rapid Transportation, Inc., Student Transit Corporation, and Northtown Bus Service, Ltd., were successful bidders on this Board of Education contract. Petitioners were permitted to intervene as defendants in the proceedings below.

The trial court dismissed Willett's original complaint to vitiate the award on the basis that it lacked standing as a losing bidder to bring such an action. Thereafter, however, the trial court permitted the suit to proceed as a taxpayer's suit over the objections of Petitioners herein.* At the conclusion of a trial, the court, sitting without a jury, found that Willett had not proved that it had not received the subject bid amendment and denied Willett's request for declaratory and injunctive relief. (A-16).

Willett appealed to the Illinois Appellate Court from the decision in favor of the defendant Board of Education. The Appellate Court reversed the judgment of the trial court and granted Willett's prayer for relief, which included the entry of a mandatory injunction nullifying the bid award and ordering the contract re-bid.** The Appellate Court not only reversed the trial court's finding on the issue of proof of mailing the subject bid amendment, but also held that the requirements of a taxpayer's suit were satisfied. The court made this ruling on the basis of the testimony of a Willett officer

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* Petitioners herein, also taxpayers, have challenged and objected to Willett's prosecution of this case as a taxpayer's suit throughout the proceedings below.

** Two of the three years of the subject contract having already elapsed, the disruptive effect of the Appellate Court's ruling on Petitioner's business, the public, as well as on the handicapped school children is clear.

that had it received notice of the subject amendment, the amount of its bid would "probably" have been lower than that submitted by the other bidders. However, in reversing the trial judge, the Appellate Court acknowledged that in the instant case it was most questionable that the public, considering the impact of "inflation", would be benefitted by its Order requiring a re-bid of the subject contract. (A-15).

A petition for rehearing was filed in the Illinois Appellate Court on January 19, 1982 and was denied on February 23, 1982. (A-2). Thereafter, the Board of Education and intervenor-defendants filed a Petition for Leave to Appeal to the Illinois Supreme Court, which was denied on May 28, 1982.* (A-1). Although no petition for rehearing was filed, the Illinois Supreme Court granted a Stay of the Mandate pending disposition of this Petition. At the same time, the Illinois Supreme Court also denied Willett's request for immediate issuance of the mandate.

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* The Attorney General of the State of Illinois filed a brief as *amicus curiae* in support of the Petition for Leave to Appeal of the Board of Education and petitioners herein. The Attorney General's brief framed the issue as follows:

> "The crucial question presented by the instant case is whether a disappointed bidder on a governmental contract has standing as a taxpayer to sue to invalidate such contract where the result of such a suit will almost certainly lead to an increased expenditure of tax dollars." Brief of Attorney General at 1.

The Attorney General concluded:

> "[I]n the instant case while it was in plaintiff's interest as a disappointed bidder on the contract to sue to invalidate the contract so that it would have the opportunity to submit another bid, such interest did not coincide with the interest of the taxpayers in spending as little as possible to obtain necessary governmental services." *Id.* at 3.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW PRESENTS AN IMPORTANT CONSTITUTIONAL QUESTION WHICH HAS NOT HERETOFORE BEEN DECIDED BY THIS COURT.

The decision of the Illinois Appellate Court involves a constitutional issue which has never been decided by this Court. Specifically, the opinion of the Appellate Court sanctions the adjudication of taxpayer suits despite the fact that the standing of the representative plaintiff-taxpayer is diametrically opposed to the interests of the Illinois taxpayers it purports to represent. The issue is one of great importance because it involves basic principles of due process embodied in the Fourteenth Amendment to the United States Constitution.

A plaintiff claiming taxpayer standing must be a proper party to request adjudication of a particular issue, *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968), because, as Justice Harlan pointed out, "[t]he relief available to such a plaintiff consists entirely of the vindication of rights held in common by all citizens." 392 U.S. at 118 (Harlan, J., dissenting). Like many other representative actions, taxpayer suits are "'public actions' brought to vindicate public rights." *Id.* at 120. *Compare, Hawaii v. Standard Oil Company of California*, 405 U.S. 251, 266 (1972) (discussing both *parens patriae* and class actions as appropriate procedures to vindicate public rights under the antitrust laws). The decision of the lower court granting Willett taxpayer standing on the basis of "savings to the . . . general taxpayers" (A-14) is "based on the theory that a taxpayer is a private attorney general seeking to vindicate the public interest." 392 U.S. at 108 (Douglas, J., concurring). *Compare, United States*

Parole Commission v. Geraghty, 445 U.S. 388, 403 (1980) (the "right" to class certification "is . . . analogous to the private attorney general concept"). However, when the remedy sought by a representative taxpayer is antagonistic to the interests of all other taxpayers, the public interest is not and cannot be vindicated. To the contrary, the due process rights of the general taxpayers who likely face an increased tax burden if the representative taxpayer prevails are denied.

In a representative action, due process requires, at the very least, that the interests of the representative party may not be directly antagonistic to the interests of the absentees which the representative purports to champion. *Hansberry v. Lee*, 311 U.S. 32 (1940); *see also, Sam Fox v. United States*, 366 U.S. 683, 691 (1961). A representative plaintiff cannot maintain his action, and will not be allowed to pursue his action on behalf of absentee third parties, when his interests are "antagonistic in fact to, *or even 'potentially conflicting' with*," the interests of the persons he purports to represent. *Phillips v. Klassen*, 502 F.2d 362, 366 (D.C. Cir. 1974) (emphasis added); *see also, Fowler v. Birmingham News Co.*, 608 F.2d 1055 (5th Cir. 1979); *Nat. Ass'n of Regional Medical Programs v. Mathews*, 551 F.2d 340, 345 (5th Cir. 1976), *cert. den.*, 431 U.S. 954 (1977); *Susman v. Lincoln American Corp.*, 561 F.2d 86, 90 (7th Cir. 1977); *Sperry Rand Corp. v. Larson*, 554 F.2d 868 (8th Cir. 1977).

At present, there is no decision of this Court which has addressed the question of a taxpayer-plaintiff's standing to serve as a representative plaintiff where his interests are antagonistic to those of all other taxpayers he seeks to represent. However, in other representative actions, such as class actions, this Court has consistently held that due process requires that a determination be made as to whether the representative party adequately

represents the interests of the class. *See, e.g., Hansberry v. Lee*, 311 U.S. 32 (1940); *Smith v. Swormstedt*, 57 U.S. (16 How.) 288, 302 (1853). In such determinations, courts must focus on the relief sought by the representative and whether such relief would or would not be repugnant to absent class members. Indeed, in the context of class actions there are frequently occasions when absent class members would prefer to see no action brought at all if the relief sought by the representative were ultimately granted. *See, e.g., Ihrke v. Northern States Power Company*, 459 F.2d 566, 572 (8th Cir. 1972). Had this case been brought as a class action rather than as a taxpayer's action, it would be inconceivable that a class of Illinois taxpayers would agree with a losing bidder's desire to reopen bidding on a public contract which was awarded more than two years previously, particularly in view of the fact that it would likely cost taxpayers more money.

In this case, Willett had initially filed its suit in state court as an unsuccessful bidder to nullify the award of a public contract.* After dismissal of its action for lack of standing, Willett refiled its complaint alleging that it was bringing the action on its own behalf and on behalf of all other Illinois taxpayers. During the course of the trial below, Willett did not and could not prove that the relief it was seeking—a re-bid of the challenged con-

* The absence of a right for unsuccessful bidders to challenge a competitively bid contract award is consistent with both federal and state court decisions. *See, e.g., Cubic Western Data v. New Jersey Turnpike Authority*, 468 F.Supp. 59, 70 (D.N.J. 1978); *Beaver Glass & Mirror v. Bd. of Ed., Rockford Sch. Dist.*, 59 Ill.App.3d 880, 376 N.E.2d 377, 381 (2d Dist. 1978). Thus, unlike a class representative who can pursue an action on his own behalf if denied class certification, a disappointed bidder has no standing to challenge an award except in the guise of a taxpayer.

tract, years after the contract was awarded and in operation—would result in any monetary savings to the taxpayers. At best, even if Willett were able to obtain the relief it sought at the very instant it filed its complaint, its claim of taxpayers' savings at that time would be wholly speculative and inconsistent with the minimal "good faith pocketbook" requirement articulated in *Doremus v. Board of Education*, 342 U.S. 429 (1952).

The opinion of the Illinois Appellate Court recognized that because Willett had "assumed the posture of a taxpayer" it was "obligated to prove that the action of the Board resulted in a true loss to the general taxpayer." (A-13). The court calculated what it felt could have been the extent of taxpayers' "savings" had Willett received the disputed Amendment to the Solicitation of Bids at the time of the original bid. However, the court pointedly refused to consider whether the *relief* sought in Willett's taxpayer action was actually in the interest of the taxpaying public, stating that it would "not indulge in speculation as to whether rebidding of these contracts will meet or exceed, by virtue of inflation, the amounts previously bid in April of 1980." (A-15). With this statement, the Appellate Court tacitly acknowledges that Willett could not demonstrate that the relief it sought would not, in fact, cost Illinois taxpayers more money. Thus, if the decision of the Illinois Appellate Court is allowed to stand and the subject contract rebid at this late juncture, only Willett, if successful in its re-bid, would profit. Illinois taxpayers, however, who, in these inflationary times, will invariably have to pay the cost of a more expensive contract than that awarded in April 1980, would suffer a pecuniary loss.*

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* The only evidence offered in support of Willett's allegation of taxpayer benefits was the self-serving testimony of an of-

(Footnote continued on following page)

More importantly, if the lower court's decision is allowed to stand, representative actions brought under the guise of "taxpayer suits" can be used to advance interests of the representative alone, to the detriment of the public at large. A decision by this Court limiting taxpayer standing when the due process rights of taxpayers at large are denied, would prevent egregious cases such as the case at bar. By the lower court's reasoning, the interests of a representative litigant as a taxpayer (and, *a priori*, the interests of all the taxpayers the litigant purports to represent) are subordinated to the litigant's personal interest.* This clear conflict of interest, sanctioned by the decision of the lower court, amounts to a taking of the property of Illinois taxpayers without due process of law.

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footnote continued

ficer of Willett, that Willett's bid in April 1980 would have "probably" been lower than the bid it actually submitted had it received the subject amendment to the bid specifications. This evidence, however, does not take into account the added costs to the taxpayers if the subject contract is re-bid in 1982. Not only did the Appellate Court fail to consider "costs" of inflation, but also failed to consider the additional costs of reopening public bidding and the disruption of necessary public services.

* Among the cases which have expressed concern at the adequacy of taxpayers' representation when the plaintiff qua taxpayer is also a disappointed bidder are *Pullman Incorporated v. Volpe*, 337 F.Supp. 432, 442 n.4 (E.D.Pa. 1971); *Szmodis v. Romney*, 307 F.Supp. 607, 610 (E.D.Pa. 1969); *Contel Construction Corporation v. Parker*, 261 F.Supp. 428, 431 (E.D.Pa. 1966).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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